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In The

Supreme Court of the United States

PAUL L. GLOVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF AMICUS CURIAE FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that an additional six to twenty-one months in prison due to counsel's error relating to the Sentencing Guidelines fails to satisfy the "prejudice" prong of *Strickland v. Washington*, 466 U.S. 668 (1984).

2. Whether the court of appeals erred in holding that a two-level error in the offense level under the Sentencing Guidelines was *per se* insufficient to satisfy the "prejudice" prong of *Strickland v. Washington*, 466 U.S. 668 (1984), even where this two-level error resulted in the petitioner being sentenced to an additional six to twenty-one months in prison.

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BRIEF OF AMICUS CURIAE FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Families Against Mandatory Minimums Foundation (FAMM) files this amicus brief pursuant to this Court's Rule 37.2(a) in support of Paul Glover's petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Both petitioner and respondent have granted amicus FAMM consent to file this brief, and letters of consent have been filed with the Clerk of this Court.[1]

INTERESTS OF AMICUS CURIAE

FAMM is a nonprofit, nonpartisan organization that conducts research, promotes advocacy and educates the public regarding the excessive cost of mandatory minimum sentencing. This cost is not limited to public expenditures but includes the perpetuation of unwarranted sentencing disparities, disproportionate sentences, and the transfer of the sentencing function from the judiciary to the prosecution.

Founded in 1991, FAMM has 30 chapters and 18,000 members nationwide. FAMM conducts sentencing workshops for its members, publishes a newsletter, serves as a

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[1] In accordance with Supreme Court Rule 37.6, FAMM represents that no counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than FAMM, made any monetary contribution to its preparation and submission.

sentencing clearinghouse for the media, and researches sentencing cases for pro bono litigation. FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime. As an alternative to mandatory sentences, FAMM supports sentencing guidelines systems that are more sensitive to differences in culpability.

Therefore, FAMM has a special interest in ensuring that the U.S. Sentencing Guidelines function as they were designed – to reduce disparities – rather than create additional injustices through inconsistent application. Since 1995, FAMM has sponsored a Litigation Project. The Project's activities include providing input to the U.S. Sentencing Commission on Guidelines amendments and reform, screening cases and referring some to pro bono counsel, litigating cases in state and federal courts as *amicus curiae* and counsel of record, and providing pro bono consulting services to criminal defense counsel appearing before the U.S. Supreme Court. Directly relevant to the issue presented by this petition, over the past five years, the Litigation Project's staff has reviewed hundreds of letters, legal filings and court documents from defendants in federal criminal cases that involve Sentencing Guidelines issues. FAMM's legal staff has found numerous cases in which errors in guidelines calculations have resulted in higher sentences for defendants convicted of federal offenses. While not every case necessarily involved ineffective assistance of counsel, based upon our knowledge of the Guidelines and the cases we have reviewed, FAMM believes that attorney error in Guidelines sentencing is a recurring problem. Therefore,

as *amicus curiae*, FAMM urges the Court to address the important issue raised by this petition.

SUMMARY OF THE ARGUMENT

According to Seventh Circuit law, a defendant who receives additional time in prison as a direct result of representation that fell so far below professional norms so as to offend this Court's definition of the Sixth Amendment's guarantee of adequate representation, still has no recourse in the federal courts to correct his sentence. In fact, neither *Strickland v. Washington*, 466 U.S. 668, 690 (1984), nor any of this Court's ineffective assistance of counsel cases remotely suggests this abrogation of the guarantees in the Sixth Amendment's right to counsel and the Fifth Amendment Due Process Clause. Thus, it is not surprising that the Seventh Circuit's decisions on this issue conflict in some way with the various decisions of other circuits. Moreover, the Seventh Circuit's "significant prejudice" test ultimately allows the courts to ignore a serious issue in federal criminal practice: the difficulty of maintaining professional competence in the face of the complex and ever changing Sentencing Guidelines. The petition for certiorari should be granted to address this important policy issue.

REASONS FOR GRANTING THE WRIT

The questions presented are important to the administration of federal criminal justice, and the Seventh

Circuit's opinion is inconsistent with this Court's precedent and decisions of other circuits.

1. There exists a circuit conflict that is ripe for this Court's review.

The Seventh Circuit's rule that a six to twenty-one month increase in sentence fails to constitute "significant prejudice" represents the extreme end of a spectrum of conflicting circuit court opinions. The courts of appeals have generated a variety of distinct approaches to this issue, making it ripe for review by this Court.

For example, three circuits have granted § 2255 motions where the change due to counsel's error is two offense levels or less. *See United States v. Granados*, 168 F.3d 343 (8th Cir. 1999) (granting ineffective assistance of counsel motion for two-level error); *United States v. Thompson*, 27 F.3d 671 (D.C. Cir.), *cert. denied*, 513 U.S. 1050 (1994) (holding that one-level increase constituted prejudice); *United States v. Soto*, 132 F.3d 56, 59 (D.C. Cir. 1997) (similar); *United States v. Headley*, 923 F.2d 1079 (3d Cir. 1991) (similar). Two other circuits, the Second and the Ninth, have gone further, granting such motions where there was only a possibility of an enhanced sentence should petitioner be later arrested and sentenced under a repeat offender statute. *See Jackson v. Leonardo*, 162 F.3d 81 (2d Cir. 1998); *United States v. Palomba*, 31 F.3d 1456 (9th Cir. 1994). The Fourth, Fifth and Tenth Circuits have adopted a "significant prejudice" standard for ineffective assistance of counsel cases, but none of these courts have adopted the Seventh Circuit's explicit rule that a two-

offense-level change due to counsel's deficient performance is *per se* insufficient to constitute "prejudice" under *Strickland*. *See Spriggs v. Collins*, 993 F.2d 85, n.4 (5th Cir. 1993) (indicating *Strickland* prejudice would be found "when a deficiency by counsel resulted in a specific, demonstrable enhancement in sentencing."); *United States v. Murray*, 176 F.3d 476, 1999 WL 187192, *5 (4th Cir. Apr. 6, 1999) (per curiam) (*Strickland* prejudice found where counsel's deficient performance may have caused petitioner to be sentenced at level 39, rather than level 37); *United States v. Kissick*, 69 F.3d 1048 (10th Cir. 1995) (*Strickland* prejudice found where counsel's deficient performance may have caused petitioner to be assigned a criminal history category VI, rather than IV). Thus, the Court should grant certiorari to resolve these conflicting views among the courts of appeals on this issue.

2. The Seventh Circuit's "significant prejudice" test exacerbates a significant problem in the representation of federal criminal defendants.

The Seventh Circuit's rule camouflages rather than corrects serious issues concerning defense attorney competence under the Sentencing Guidelines. The Sentencing Guidelines were established to curtail widespread sentencing disparities. However, the Guidelines have grown more and more complex since they were first published in 1987; in fact, the amendments and commentary now take up more room than the sentencing rules themselves. Mary Pat Flaherty & Joan Biskupic, *Despite Overhaul, Federal Sentencing Still Misfires*, Wash. Post, Oct. 6, 1996, at A21. As a direct consequence, familiarity and competence with the Guidelines has become a significant part of

federal criminal practice. *See United States v. Soto*, 132 F.3d 56, 59 (D.C. Cir. 1997) ("Familiarity with the structure and basic content of the [Sentencing] Guidelines . . . has become a necessity for counsel who seek to give effective representation.") (quoting *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992)). With hundreds of amendments and appellate court decisions interpreting the Guidelines, sentencing practice is now full of pitfalls for unwary practitioners. The sad reality is that some criminal defense attorneys have been unable to master the complexity of guidelines calculations and others have not kept up with the constantly changing guidelines landscape. *See* Kate Stith & José A. Cabranes, *Fear of Judging* 128 (1998) (citing studies that reflect "significant variation in Guidelines competence among defense attorneys."); Mary Pat Flaherty, *Innocent Errors Add Years to Terms of Guilty Parties*, Wash. Post, Oct. 6, 1996, at A21 (detailing mistakes in sentences that survived the scrutiny of attorneys, probation officers, and judges and quoting federal public defender who spent three and a half years checking defendants' sentences to conclude that math errors are made all the time). Quite clearly, sentencing is now an area in which there is a significant problem with attorney competence and preparation.

The Seventh Circuit's "significant prejudice" test sweeps cases like Mr. Glover's under the rug – leaving no forum where his unlawful sentence or counsel's errors can be addressed. Such a situation is not only unjust, it is also unhealthy for the criminal justice system. This is now apparent even to Seventh Circuit Judge Rovner, who joined the Seventh Circuit opinion that adopted the "substantial prejudice" test, but who now believes it should

be overturned. *Compare Durrive v. United States*, 4 F.3d 548 (7th Cir. 1993), *with Martin v. United States*, 109 F.3d 1177, 1178 (7th Cir. 1996) (Rovner, J., dissenting from denial of rehearing *en banc*). In addition to criticizing the doctrinal foundation of the "significant prejudice" test, Judge Rovner writes that "[w]hat the court has effectively done, it seems to me, is to lower dramatically the quality of advocacy vis a vis sentencing that will satisfy the Sixth Amendment. . . . [T]he defendant is entitled only to an attorney who does not overlook 'grave errors,' having a 'large effect' on the sentence." *Id.* at 1184-85. Thus, rather than encouraging defense counsel (and other sentencing participants, for that matter) to stay current on Guidelines issues and amendments, the Seventh Circuit rule reassures the weakest members of the federal criminal bar to rest assured that "minor" errors resulting from incompetence or laziness will not be reviewed. The Court should not endorse such a regime. So long as Congress leaves the Sentencing Guidelines in place, the Court should insist that the criminal defense bar be held to a standard that ensures defendants serve the time the law requires but not a day more.

Although the Sentencing Guidelines restrict judicial discretion, Congress – by providing for appellate review of guidelines sentences in the Sentencing Reform Act of 1984 – enlisted the appellate courts to ensure proper and uniform enforcement of the Guidelines. Contrary to this goal, a direct appeal may be meaningless where there is ineffective assistance of counsel at sentencing (especially when the defendant is represented by the same attorney at both proceedings). Errors in presentence investigation reports are often overlooked by judges, prosecutors, and

defense attorneys, many of whom see the probation officer as the expert. *See* Kate Stith & José A. Cabranes, *Fear of Judging* 129 (1998) (noting that many judges accord the probation officer's calculations presumptive weight). These errors remain uncorrected on direct appeal, due to the continued ineffectiveness of counsel or the lack of an adequate record. Thus, collateral review of attorney error is essential to effectuate the aims of the Sentencing Reform Act's review provisions.

In a number of ways, the Seventh Circuit's standard increases the sentencing disparities that the Guidelines were designed to eliminate. First, disparities between similarly situated defendants occur when an attorney fails to raise a meritorious issue. Second, the "significant prejudice" test creates a substantial likelihood of additional disparities between circuits, and even between panels within circuits. Because "significant prejudice" is not defined, either in absolute length or as a percentage of a sentence, individual panels and circuits are likely, and in fact have begun, to reach inconsistent results. *Compare Martin*, 109 F.3d 1177 (7th Cir. 1996), *with United States v. Kissick*, 69 F.3d 1048 (10th Cir. 1995), *cert. denied*, 117 S. Ct. 1008 (1997). As Judge Rovner remarked in her dissent in *Martin*,

> I cannot help but believe that in the adoption of this "significance" test, we have transformed ourselves into a kind of feudal duchy, with the power to grant or deny a reprieve to wrongfully sentenced prisoners according to our own whim. This is repugnant not only to our office as appellate judges but to the Guidelines themselves, which after all were adopted to achieve

> greater consistency in sentencing among similarly situated defendants.

109 F.3d at 1184.

3. Reversing the Seventh Circuit's "significant prejudice" test would not open the floodgates to a deluge of collateral sentencing litigation.

In *Durrive*, the case in which the Seventh Circuit created the significant prejudice test, the defendant argued that his offense level was two levels too high because the sentencing court failed to comply with Rule 32 of the Federal Rules of Criminal Procedure. Specifically, Durrive complained that the judge failed to ask whether he had personally read the presentence report, and he argued that if counsel had requested compliance with this Rule 32 requirement, the court would have found that the conspiracy contemplated a lesser quantity of cocaine (and hence applied an offense level of 26 rather than 28). However, this defendant never explained the link between the Rule 32 error and the quantity determination made by the court. Nor was it likely he could have done so. He admitted that he had read the presentence report with counsel and that counsel contested the conclusions of the report "at some length" during the sentencing hearing. Thus, the real problem with the defendant's argument in *Durrive* was not the degree of prejudice but the tenuous connection between counsel's error and the allegedly incorrect offense level. Applying the traditional *Strickland* test, the court simply could have held that the defendant failed to prove causation – that

but for counsel's error, the result would likely have been different.

In needlessly creating the "significant prejudice" test, the Seventh Circuit relied upon a fundamentally flawed description of Guidelines sentencing; that is, the *Durrive* court treats all sentencing decisions as if they are discretionary. Their reasoning is as follows: "Because the judge both determines a range and selects from within that range, almost any of counsel's actions has a potential effect on the sentence. Small failings by counsel are not enough to turn a probable acquittal into a probable conviction; equally slight failings could turn a 115 month sentence into a 120 month sentence." 4 F.3d at 550. Implicit in this analogy is an assumption that it is always impossible to determine how an error at sentencing impacts the ultimate sentence. This is simply not true for some types of attorney errors under the Sentencing Guidelines. While it may be difficult to identify the impact of attorney error on a judge's factual determinations or the sentence selected within a particular guidelines range, other sentencing choices have been constrained by the Commission and Congress to mechanical rules application, and hence objectively determinable ones. In some Guidelines cases, it is possible to determine very precisely the increase in offense levels or prison time caused by attorney incompetence.

The Seventh Circuit's incomplete sentencing model also explains how it was able to claim doctrinal support for its new rule. The *Durrive* court cites *Spriggs v. Collins*, 993 F.2d 85 (5th Cir. 1993) (*per curiam*), as the source of the "significant prejudice" test. However, *Spriggs* involved a

state penalty phase of a capital murder case in which the sentencing court enjoyed wide discretion to determine the sentence. In such cases, the *Spriggs* court correctly noted that it can be difficult to identify the impact of attorney error on the sentence selected. Therefore, it made sense to the Fifth Circuit to require a defendant to demonstrate that the error had a significant impact, not on the length of the sentence, *per se*, but on the court's exercise of its discretion in imposing that sentence. To take this reasoning and transpose it onto the Guidelines regime, where the precise impact can be measured, distorts the rule's original rationale. As Judge Rover noted in her dissent from the petition for rehearing *en banc* in *Martin*, "We have transformed *Spriggs* into an ostrich of a rule that deliberately blinds us even to an error that produces a quantifiable increase in a petitioner's sentence. Nothing in *Spriggs* supports that result." 109 F.3d at 1183.

At its heart, the Seventh Circuit's "significant prejudice" test is motivated by a fear of additional collateral review, not a principled argument based on *Spriggs* or this Court's decision in *Strickland* and its progeny. In *Durrive*, the court argued that unless a stricter standard is required for ineffective assistance of counsel claims at sentencing "almost any error at sentencing may be recast as a challenge to counsel." 4 F.3d at 550. Several years later in *Allen v. United States*, 175 F.3d 560, 563 (7th Cir. 1999), this court added, "We are reluctant to allow prisoners to circumvent the rule against raising Sentencing Guideline arguments in collateral proceedings by recasting their Guideline arguments as claims of ineffective assistance of counsel."

However, although there is a documented problem with sentencing practices under the Guidelines, this does not mean that overturning the "significant prejudice" test will result in a flood of collateral reversals of federal sentences. In reality, both the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the *Strickland* standard itself already impose substantial hurdles that only the clearest of cases, such as Glover's, can overcome. Recognizing that, in some cases, the Guidelines make it possible to measure the impact of attorney error at sentencing does not mean that all or even most guidelines calculations will be open to collateral attack. In petitioner Glover's case, the error was legal and could not be more clearly defined; either the convictions should be grouped or not. Therefore, the sentencing judge's decision was mechanical, not factual or discretionary at all. On the other hand, more cases are factually like those in *Durrive*, where the attorney error is both less clear and the impact of the error on the court's discretion harder to measure.

4. The Seventh Circuit's holding that an additional six to twenty-one months in prison is not "significant prejudice" is inimical to the rights guaranteed by the Fifth and Sixth Amendments.

The core of the Seventh Circuit's rationale for the significant prejudice test – that an increase in prison time of six to twenty-one months does not constitute sufficient "prejudice" under *Strickland* – conflicts with this Court's understanding of due process and the right to counsel. The Seventh Circuit purported to acknowledge that "any extra time in prison is significant from the defendant's perspective." *Martin v. United States*, 109 F.3d 1177, 1178

(7th Cir. 1997). Nevertheless, the Seventh Circuit claimed the power to adopt a rule of "proportionality" that allows it to deign what additional amount of prison time is significant enough to merit additional review by a federal court. *Id.* Apparently, the Seventh Circuit believes the costs to the court system in considering these cases are sufficient to counterbalance a particular defendant's loss of liberty. This assessment cannot be reconciled with the due process principle that loss of liberty is the most fundamental right protected by the constitutional provisions that regulate the criminal justice system. As this Court has stated, "[A]ny deprivation of liberty is a serious matter." *Argersinger v. Hamlin*, 407 U.S. 25, 41 (1972). *See also Scott v. Illinois*, 440 U.S. 367, 372-73 (1979); *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (requiring judicial determination of probable cause within 48 hours of arrest).

Nowhere in *Strickland's* discussion of the prejudice prong is there any suggestion that additional prison time does not qualify as prejudice. The Seventh Circuit can only make that claim by altering the *Strickland* test to require that the defendant show *"significant* prejudice." But as this Court has recognized, a single day in prison is quite significant to the defendant. *See Argersinger v. Hamlin*, 407 U.S. at 37 (1972) (" '[T]he prospect of imprisonment for however short a time will seldom be viewed by the accused as a 'trivial' or 'petty' matter and may well result in quite serious repercussions . . . ' ") (quoting *Baldwin v. New York*, 399 U.S. 66, 73 (1970)). The Seventh Circuit trivializes Mr. Glover's unlawfully lengthened prison term by reference to even greater sentencing injustices. Such a comparison is an affront to a fundamental

tenant of our criminal justice system – the principle of individualized justice. *See Stack v. Boyle*, 342 U.S. 1, 9 (1951) (Jackson, J., concurring) ("[E]ach defendant stands before the bar of justice as an individual.").

While those on the front lines of the criminal justice system may sometimes see themselves as performing triage surgery in an overburdened system, the fundamental principles of due process cannot allow the courts to create rules that disregard fundamental injustices just to keep the cases moving. A term of imprisonment carries with it various kinds of intentional and unintentional dehumanization and humiliation. It often includes the risk of inadequate medical care, assault and rape. These dangers are present each and every year, month, day and hour of prison time. Because the Seventh Circuit has condoned the continued incarceration of Mr. Glover for at least several months, despite its assumption that his sentence was the result of an error of constitutional magnitude, the "significant prejudice" test should be overruled.

CONCLUSION

For all of the foregoing reasons, FAMM, as *amicus curiae*, respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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